

REMARKS

Applicant respectfully traverses the Examiner's species restriction requirement.

"In the first action on an application containing a generic claim to a generic invention (genus) and claims to more than one patentably distinct species embraced thereby, the examiner may require the applicant in the reply to that action to elect a species of his or her invention to which his or her claim will be restricted if no claim to the genus is found to be allowable." 37 CFR §1.146

In the present application, the Examiner states: "Currently, no claim is generic."

It is respectfully submitted that this position of the Examiner is contrary to the language of 37 CFR §1.146 as quoted hereinabove.

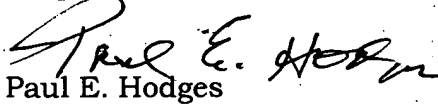
Specifically, §1.146 states that "In the FIRST action on an application CONTAINING A GENERIC CLAIM..." the Examiner may require an election of species. Clearly, this language requires the Examiner to INITIALLY make a determination that there is a generic claim present in the application BEFORE an election of species may be required by the Examiner. In the present instance, no such determination has been made by the Examiner. But, rather, the Examiner has made a determination that "Currently, no claim is generic." without any indication as to the basis for this determination. No prior art has been cited, no statutory basis for this determination has been cited, nor has there been presented any other basis for the Examiner's assertion that no generic claim is present in the application. This determination flies in the face of the language of §1.146. To interpret §1.146 to permit the Examiner to require an election of species BEFORE there has been a determination by the Examiner that a generic claim exists in the application effectively eliminates the requirement of §1.146. Moreover, the action by the Examiner in requiring an election of species before he or she has made a determination that there exists a generic claim destroys the basic premise of §1.146 which is to permit a species restriction after there has been a determination that there is a generic claim in the application. It is submitted that the allowability of the generic claim is not an issue under §1.146.

Whether §1.146 is proper or improper as it exists is a determination to be made by the Commissioner. Until there is some change in the language of §1.146, it is respectfully submitted that it is obligatory upon the Examiner to make an initial determination of the existence of a generic claim in the application (not whether the claim is allowable, which is the function of further examination of the application) before issuance of a species election requirement.

In the present application, Claim 1 is clearly generic and all of the remaining claims currently existing in the application are dependent, either directly or indirectly, on Claim 1, with the exception of Claims 18 and 19 which are directed to the blank. (See MPEP 806.04(d)).

Withdrawal of the present species election requirement and examination of all of Claims 1-19 which are present in the application as originally filed are respectfully requested.

Respectfully submitted,



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